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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 770

I. B. ADELMAN,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., a New York corporation, PARAMOUNT FILM DISTRIBUTING CORPORATION, a Delaware corporation, LOEW'S INCORPORATED, a Delaware corporation, RADIO-KEITH-ORPHEUM CORPORATION, a Delaware corporation, RKO RADIO PICTURES, INC., a Delaware corporation, WARNER BROS. PICTURES, INC., a Delaware corporation, WARNER BROS. PICTURES DISTRIBUTING CORPORATION, a New York corporation, TWENTIETH CENTURY-FOX FILM CORPORATION, a New York corporation, COLUMBIA PICTURES CORPORATION, a New York corporation, UNITED ARTISTS CORPORATION, a Delaware corporation, UNIVERSAL PICTURES COMPANY, INC., a Delaware corporation, UNIVERSAL FILM EXCHANGES, INC., a Delaware corporation, INTERSTATE CIRCUIT, INC., a Delaware corporation, and TEXAS CONSOLIDATED THEATRES, INC., a Delaware corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I. B. Adelman, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on December 8, 1961.

OPINIONS BELOW.

The opinion (R. 230-51) of the United States District Court for the Southern District of Texas, Houston Division, is reported at 182 F. Supp. 217.

The opinion of the Court of Appeals is not yet reported but is printed in an appendix hereto, *infra*, pp. 13-15.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 8, 1961. It is printed in an appendix hereto, *infra*, p. 16. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether respondent exhibitors, who were found to have monopolized the first run exhibition business in violation of §§ 1 and 2 of the Sherman Act, are entitled to be protected by court decree from petitioner's first run competition?

2. Whether the defenses of *res judicata* and estoppel can be invoked to defeat a petition for modification of an antitrust decree, the provisions of which are contrary to the public policy of the antitrust laws?

3. Whether petitioner who won his antitrust suit but was granted only part of the injunctive relief he sought is barred from later seeking like relief despite changed circumstances rendering the original decree inadequate?

STATUTE INVOLVED.

Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, providing in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. * * *"

STATEMENT OF THE CASE.

This case involves an attempt by petitioner to modify a decree entered in a civil suit under the antitrust laws in which petitioner was the plaintiff and successful party. The trial court dismissed the petition to modify on the grounds that the relief sought was barred by *res judicata* and estoppel. The court below affirmed.

Petitioner, L. B. Adelman, owns and operates the Delman Theatre in Houston, Texas. Respondents are distributors and exhibitors of motion pictures.

In 1948, petitioner brought an action under the federal antitrust laws for treble damages and injunctive relief. The complaint alleged that respondents had conspired to monopolize and had a monopoly of the first and second run exhibition business in the City of Houston. It was alleged that by reason of the conspiracy, petitioner's Delman was unable to license films of respondent-distributors on either an exclusive first or second run (R. 8-46).

The case was tried in 1955 before a jury and a verdict returned in petitioner's favor in the amount of $20,000. Judgment was entered on the jury verdict in the trebled

amount of $60,000, together with attorneys' fees and costs (R. 67).

Following the trial, the trial judge, the late Lamar Cecil, held a further hearing on the question of equitable relief, at the conclusion of which he entered findings of fact, conclusions of law and a final decree.

The court found that petitioner's Delman had been offered only limited opportunity to compete for films with Interstate's first run theatres (the Metropolitan, Majestic and Kirby) and that such restricted competition "has prevented the plaintiff from offering substantial competition to Interstate in either the first-run or second-run exhibition business in Houston *and is a result of the conspiracy to monopolize said first-run and second-run exhibition business found by the jury in this case*" (Finding 18, R. 64-5; emphasis supplied).

The court also found that the Delman had been given no opportunity to compete with Loew's State (the only other first run theatre) for first run films (Finding 13, R. 63).

Judge Cecil then found as a matter of law:

> "The defendants have been found by the jury verdict in this case to have violated Sections 1 and 2 of the Sherman Act *by conspiring with each other to monopolize the first-run and second-run exhibition of films in Houston, Texas*" (Conclusion of Law 1, R. 66; emphasis supplied).

At the time of the hearing on equitable relief, there were four theatres in Houston operating on a regular first run policy.* These were Loew's State and Interstate's Metropolitan, Majestic and Kirby. Petitioner asked that a decree be entered enjoining respondent distributors from denying petitioner an equal opportunity to compete for any exclusive first run offered in Houston. This relief was only allowed in part.

---

* A fifth theatre, Interstate's River Oaks, operated on a first run "art" policy (Finding 8; R. 62-3).

The decree, after enjoining defendants from conspiring "to monopolize the first-run or second-run exhibition business in the City of Houston, Texas", enjoined defendants from:

> "3 " " A. Denying to the plaintiff an equal opportunity with the exhibitor defendants, Paramount Pictures, Inc., Interstate Circuit, Inc., Texas Consolidated Theatres, Inc. and Loew's Incorporated, to compete for an exclusive first-run of any feature film offered in Houston, Texas, except such films as may be licensed for first-run exhibition in the Loew's State, Metropolitan, or Majestic Theatres" (R. 68).

The decree thus gave the Delman an opportunity to compete with the Kirby for an exclusive first run on films offered that theatre, but there was no requirement that distributors permit the Delman to compete for films offered exhibitors' other three theatres.

No appeal was taken from the monetary judgment or final decree.

Subsequent to the entry of the decree, in April, 1956, Interstate closed the Kirby. That theatre has remained closed since that date. The only three theatres presently operating on a first run policy are the State, Metropolitan and Majestic (R. 98).

In May, 1958, petitioner filed a petition to modify the decree to permit the Delman to compete for films offered these three theatres. The petition alleged that since the closing of the Kirby, the Delman had been cut off from any access to first run films since films formerly available to the Kirby (and petitioner) are now absorbed by the State, Metropolitan and Majestic, against whom the Delman is afforded no opportunity to bid or compete (R. 98).

The petition alleged that the decree not only had failed to provide effective relief but was being used to protect

and preserve exhibitor respondents' first run monopoly (R. 100).

Respondents moved to dismiss the petition on the basis of the defenses of *res judicata* and estoppel, contending that the petition was barred since the same relief had been previously requested and denied at the original hearing before Judge Cecil (R. 234).

Judge Ingraham granted the motion and dismissed the petition on the legal defenses asserted without permitting any evidence to be offered (R. 233-4). Judge Ingraham said (R. 242-3):

> "The record in this case is clear. At every juncture plaintiff contended that he should be accorded the right to compete against the Loew's State, Metropolitan and Majestic Theatres. At every juncture he lost. From his defeat he took no appeal. He now proposes that the prior adjudication be disregarded and that he be accorded the relief heretofore specifically denied. But the prior adjudication is binding on plaintiff."

The Court of Appeals affirmed on the same grounds.*

* The Court of Appeals added however that "it was expressly determined that * * * [the Delman] was not in competition with appellees' Loew's State, Metropolitan or Majestic Theatres" despite Judge Cecil's findings and respondents' admission to the contrary. Exhibitor respondents, in their brief in the court below, said (p. 9): "The statement that the appellees base their position (that appellant is not entitled to an injunction guaranteeing his Delman the right to compete against the three downtown houses) upon the lack of substantial competition between the theatres is not correct; * * * There was and is competition between the downtown houses exhibiting first run films and all theatres in Houston including the Delman * * *"

REASONS FOR GRANTING THE WRIT.

I.

THE HOLDING OF THE COURT OF APPEALS THAT THE PETITION IS BARRED BY RES JUDICATA AND ESTOPPEL IS CONTRARY TO THE PUBLIC POLICY OF THE ANTITRUST LAWS.

The trial court and the court below, in dismissing the petition, held that since the same relief sought was denied at the original hearing on injunctive relief and no appeal was taken, petitioner is permanently barred from seeking this same relief, regardless of changed circumstances claimed to have rendered the decree inadequate.

The holding conflicts in principle with this Court's decision in *United States* v. *Swift & Co.*, 286 U. S. 106, 114-5, 76 L. Ed. 999, 1005-6, that "a continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need," and "a court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."

At the time Judge Cecil entered the original decree, there were four first run theatres in Houston. The decree assured the Delman of the right to compete for first run films offered the Kirby. As long as the Kirby continued to operate on a first run, the Delman had access to one-fourth of distributors' first run films. The decree did not give petitioner unlimited access to first run product, but it provided tentative and partial relief in this direction. When Interstate closed the Kirby, petitioner's source of first run

films was cut off. Pictures formerly available to the Kirby (and petitioner) are now absorbed by the State, Metropolitan and Majestic Theatres.

The petition alleged, and respondents by their motions to dismiss admitted, that since the Kirby closed, petitioner has been afforded "no opportunity at all to bid against or compete with any downtown first run theatre" for first run films (R. 98).

It is apparent that the closing of the Kirby was a changed circumstance which made appropriate a reconsideration of the efficacy of the present decree.

Nevertheless, the Court of Appeals has announced the novel doctrine that because the successful plaintiff in an antitrust case did not get all the relief he asked for at the initial hearing, and did not appeal the decree, he is forever barred from seeking that relief which was denied. We submit that such a ruling puts court decrees in a strait jacket and places the interest of the public in decrees which effectively redress proven violations of the antitrust laws "at the mercy" of the parties.

This Court has held that the defense of *res judicata* cannot be invoked to defeat the public policy of the antitrust laws. In *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U. S. 661, 669-70, 88 L. Ed. 376, 383, in holding that the defense of *res judicata* would not bar a misuse defense to a patent infringement suit, the Court said:

> "* * * it does not follow that the doctrine of *res judicata* forecloses the defense which is tendered.
>
> "Respondents ask the equity court for an injunction against infringement by petitioner of the patent in question and for an accounting. Should such a decree be entered, the Court would be placing its imprimatur on a scheme which involves a misuse of the patent privilege and a violation of the anti-trust laws."

Here, by permitting the defenses of *res judicata* and estoppel, the Court of Appeals has in effect placed its imprimatur on exhibitor respondents' first run monopoly. Respondent distributors rely on and assert the decree as grounds for refusing to permit the Delman to compete for films offered to exhibitors' Big Three theatres. Not only is this an anomalous result where petitioner won his antitrust case, but it is contrary to the antitrust laws and the public interest.

This Court, in *International Salt Co. v. United States*, 332 U. S. 392, 401, 92 L. Ed. 20, 28 said that the public interest served by civil suits under the antitrust laws is that "they effectively pry open to competition a market that has been closed by defendants' illegal restraints." The holding of the court below achieves just the contrary result.

II.

THE HOLDING OF THE COURT OF APPEALS PROTECTS EXHIBITOR RESPONDENTS FROM PETITIONER'S FIRST RUN COMPETITION AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Under the terms of the decree and the holding of the court below, petitioner's Delman is prevented from competing with exhibitor respondents' three first run theatres. Respondent distributors offer their top pictures first to these theatres and it is only pictures which they reject that petitioner has an opportunity to license on a first run. Thus, these theatres are in effect given a right of first refusal.

Certainly exhibitor respondents have no vested right to a particular playing position and they are not entitled to be protected by court decree from petitioner's first run competition.

The holding of the court below that petitioner's Delman is not entitled to compete with Loew's State, the Metropolitan and Majestic Theatres conflicts in principle with the decisions of the Seventh Circuit in *Bigelow* v. *RKO-Radio Pictures, et al.*, 162 F. 2d 520, and *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d 561. These were both movie antitrust cases and the defendants had been found guilty of a conspiracy to monopolize first run and to prefer affiliated theatres in violation of the antitrust laws. The Seventh Circuit held that plaintiffs were not entitled to be protected by court decree in a preferred playing position or run and struck provisions from the decree which would have required distributors to offer films first to plaintiffs' theatres. Thus, in *Bigelow*, the court said (p. 524):

> "* * * It has been the plaintiffs' contention, as we understand it, that no one has a vested right in a playing position. In this we agree with the plaintiffs. *The plaintiffs have a right to compete for any playing position, but they have no right to be awarded and protected by decree in any certain position*" (emphasis supplied).

And, later, in *Milwaukee Towne*, the same court said (p. 571):

> "* * * we think that plaintiff is entitled to a decree which will place it only in the same competitive position which it would have occupied absent a conspiracy. The plaintiff has no right to the award of a position superior to that of other competitors."

A fortiorari, if the successful plaintiff is not entitled to be protected by decree from the competition of his competitors, respondents, who were found to have an illegal monopoly, are entitled to no better treatment. Here, however, the decree not only denies petitioner equality of opportunity but any opportunity at all to compete for first run pictures.

CONCLUSION.

The point that should not escape notice of this Court is that respondents, by the simple device of closing the Kirby Theatre, have walked out from under Judge Cecil's decree and, at the same time, have cut off petitioner's source of first run pictures. Thus petitioner, having won the conspiracy issues in the case and having obtained partial relief from respondents' first run monopoly, is now faced with a decree which bars him from competing as a first run theatre and affords exhibitor respondents an absolute monopoly of first run exhibition in Houston. It is difficult to conceive a more incongruous result.

The private action under the antitrust laws is an important supplement to governmental enforcement of those laws and the remedial phase of such actions, more so than damages, is of obvious public importance. The successful plaintiff and the public are entitled to a decree which effectively redresses proven violation of the antitrust laws and denies to the wrongdoers the fruits of their illegal conspiracy. The holding of the court below does violence to both these principles.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 18484.

L. B. ADELMAN,
Appellant.

versus

PARAMOUNT PICTURES, INC., ET AL.,
Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS.

December 8, 1961.

Before TUTTLE, *Chief Judge*, and HUTCHESON and JONES, *Circuit Judges*.

JONES, *Circuit Judge*: This appeal might well be disposed of by a reference to the opinion of the district court in which the facts are distinctly set forth and the applicable law is clearly stated. *Adelman v. Paramount Pictures, Inc.*, 182 F. Supp. 217. The judgment of the district court is affirmed. A few observations on our part may be appropriate.

This suit was brought in 1948 by the appellant, L. B. Adelman, the owner of the Delman Theatre in Houston,

Texas, seeking an injunction to allow him to compete with specifically designated theatres which were operated by appellees for first run feature films. It was contended by the appellant that he was entitled to compete with all theatres in Houston operated by appellees. It was expressly determined that he was not in competition with appellees' Loew's State, Metropolitan or Majestic Theatres. It was held that he was entitled to compete with appellees' Kirby and River Oaks Theatres, and a judgment was entered on September 16, 1955, enjoining the appellees from denying the appellant an equal opportunity to compete for the first run of feature film in Houston except such as might be licensed for first run exhibition at Loew's State, Metropolitan or Majestic Theatres. There were two other first run theatres in Houston operated by appellees, the Kirby and the River Oaks. The Kirby was a downtown theatre; the River Oaks was not. There was no appeal from the judgment.

Subsequent to the entry of the injunction the Kirby ceased to operate as a first run theatre. In 1958 the appellant filed a petition for the modification of the injunction by giving him an opportunity to compete with the Loew's State, Metropolitan and Majestic Theatres. The district court, as appears in its opinion, concluded that the principles of estoppel and res judicata were controlling as against the appellant and dismissed the petition to modify.

The district court, having retained jurisdiction, could entertain a petition for the modification of the injunction, and it could no doubt have exercised such jurisdiction even though it had not been expressly reserved. *United States* v. *Swift & Co.*, 286 U. S. 106, 52 S. Ct. 460, 76 L. Ed. 999. It does not follow, however, that issues which have been submitted to the court and have been decided by it may be relitigated upon an application for modification. A review of the determination of such issues and the correction of an

erroneous decision may be accomplished by the established appellate procedures. 28 Am. Jur. 832, Injunctions § 319, Restatement, Judgments § 46; 6 Toumlin Anti-Trust Laws 580 § 18.17. Since it was expressly decided on the original application for an injunction that the appellant's Delman Theatre was not in competition with appellees' Loew's State, Metropolitan and Majestic Theatres, and no subsequently occurring fact is asserted as establishing the contrary of that determination, any modification of the injunction such as is now sought would be a reversal of the determination of an issue decided by the court and accepted by the appellant.

The district court's judgment is

AFFIRMED.

JUDGMENT.

Extract from the Minutes of December 8, 1961.

No. 18484.

I. B. ADELMAN,
Appellant.

versus

PARAMOUNT PICTURES, INC., ET AL.,
Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, I. B. Adelman, and the surety on the appeal bond herein, National Standard Insurance Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

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No. 770

I. B. ADELMAN,

Petitioner,

v.

PARAMOUNT PICTURES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR EXHIBITOR RESPONDENTS IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR EXHIBITOR RESPONDENTS IN OPPOSITION

This brief in opposition is submitted in behalf of Interstate Circuit, Inc. and Texas Consolidated Theatres, Inc., usually referred to as exhibitor respondents.

QUESTIONS PRESENTED

The questions with which the courts below were confronted, and with which this Court must deal if the writ is granted, are these:

1. Whether relief which was expressly denied upon the trial of the cause, in which no appeal was taken, may be obtained through a petition to modify an equitable decree.

2. Whether, when an issue has been once litigated in the trial of a cause and in effect relitigated upon an earlier modification proceeding, principles of res judicata and estoppel preclude its further litigation.

As will be hereinafter shown, petitioner did not prevail, but on the contrary lost, on the issue which he attempts to relitigate, and thus the phraseology of his first and third "Questions Presented" is incorrect; but the substance of these Questions offers the points set forth above, namely, whether petitioner can, several years after final judgment, attempt through injunction modification proceedings to reverse in part a trial court's judgment from which he did not appeal.

Petitioner's second question improperly assumes that the provisions of the trial court's decree violate the antitrust laws but nevertheless presents only the question as to whether a trial court's determination can be relitigated because (petitioner says) it was not in compliance with law, or whether such a review is denied under principles of finality of judgments, res judicata, and estoppel.

STATEMENT OF THE CASE

Petitioner's suit for treble damages and injunctive relief under the antitrust laws, filed in 1948 and brought to trial in 1955 before the court and a jury, involved basically a charge of monopoly and conspiracy in regard to first-run and second-run motion picture exhibition in Houston, Texas. The complaint involved not just a part of first-run exhibition but all first-run exhibition, as Judge Ingraham observed in his opinion (R. 246).

As the evidence developed in the trial, it became apparent that there was no basis for a charge of violation of the anti-trust laws in connection with that part of first-run exhibition that involved the licensing of pictures to the three big downtown theatres in Houston, namely, the Majestic, Metropolitan and Loew's State. There was no direct evidence anywhere in petitioner's case of express conspiracy and the trial judge so charged the jury (R. 268).

Petitioner's case rested entirely on circumstantial evidence. Such a circumstantial case typically, and in this instance, is based on the inference that where persons do something which is contrary to their apparent best business interests it may be inferred that such was done pursuant to an agreement or understanding. In the instant case, however, the evidence as it developed demonstrated overwhelmingly that the three theatres mentioned were so superior in location, appointments, grossing power and other attributes justifying a first-run, there was no basis for inferring an unlawful conspiracy or a use of monopoly power in the licensing of first-runs to such theatres in preference to petitioner's suburban Delman Theatre. The attorneys for the respondents were aware of this; the trial court became aware of it; and the attorneys who were at that time representing petitioner became aware of it. Petitioner accordingly conceded that he had no case so far as the three big downtown houses were concerned. He did not do this for the first time on the occasion of the review of the proposed charge to the jury as set forth in the record (R. 256-257). He had already done this at an

earlier time, as his counsel's statement mentioned, for counsel remarked:

> "In view of the fact that we have conceded we don't compete with those big three for the pictures, * * *" (R. 256).

This concession of petitioner as to this part of his case pertained to all elements thereof. Since the damage issue was submitted to the jury, this phase of the matter was withdrawn from its consideration by the court:

> "You are instructed that the plaintiff has conceded that he is not entitled to compete for first-run exhibition in the city of Houston against the Loew's State Theatre, the Majestic Theatre, and the Metropolitan Theatre, but does contend that he is entitled to compete for first-run exhibition against the Kirby Theatre and any other theatre operated by the exhibitor defendants" (R. 257).

The judge had in mind this determination of this phase of the litigation so far as the equity matter was concerned, for he commented at the hearing on equitable relief:

> "The Court:
>
> "Was it said upon the trial of this case that the Delman doesn't compete for first-run against Loew's State and the Metropolitan?" (R. 286).

and received an affirmative answer from petitioner's then counsel (R. 286).

The quotations of petitioner, in his Statement of the Case, from findings and conclusions of law of the trial court pertain to that phase of first-run exhibition which did *not* concern the Loew's State, Metropolitan and Majestic. It was only as to this other part of first-run, namely, that relating to

exhibition in the Kirby Theatre, the River Oaks Theatre, and occassionally other houses, that conspiracy was found and equitable relief granted. A comparison of the findings of fact, conclusions of law and decree as submitted by petitioner—with those actually made and entered by the trial court—makes this point completely clear. The memorandum opinion of the trial court below (R. 240-245, *182 F. Supp. 222-223*), develops this point fully.

A little over a year later, in October, 1956, the distributor respondents moved to modify the decree to make clear the right of a distributor to license on a nonexclusive first-run in Houston such features as the distributor desired to offer in that fashion. In this proceeding petitioner, through affidavits (R. 81, 84) and proposal of his counsel (R. 86-87), applied for just such equitable relief as he now seeks, namely, an injunction guaranteeing him a right to compete against the three big houses. The injunctive language which would accomplish this was tendered by petitioner to the court (R. 86-87) but was rejected by the trial judge who granted the relief sought by the distributor but not that sought by petitioner. At that time the Kirby Theatre had already been closed several months (R. 79).

In May, 1958 petitioner filed his instant petition to modify the decree, based on no asserted change in fact other than the closing of the Kirby two years earlier. Sixteen months later in September 1959 petitioner filed his own affidavit in support thereof but otherwise took no steps to support his

position prior to the matter being set (at the instance of distributor respondents) for hearing in early 1960. The trial court below dismissed the petition and the Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT

Petitioner asserts two reasons for granting the writ, namely, that the holding below is contrary to the public policy of the antitrust laws and, secondly, that the holding below protects exhibitor respondents from petitioner's first-run competition and thus conflicts in principle with two decisions of the Court of Appeals for the Seventh Circuit. These respondents reply to petitioner's points by developing the reasons for denying the writ under two headings:

1. *The decision below was correct.*

The essence of petitioner's argument, both in the courts below and in this Court, revolves around the contention that upon the showing made at the trial of the case in 1955 he was entitled to relief which he did not get. Four out of six of his points in the Court of Appeals, and the substance of all three questions presented by him to this Court, urge the basic contention that there was an error of law, which may now be redressed, in his having been denied the relief (which he sought then and now seeks) by Judge Cecil in 1955.

In the first place, there was never any error in denying him this relief. He conceded he had no case against the three

big downtown houses, concerning which the relief is sought; the evidence did not justify such relief; and the findings of fact and conclusions of law do not support such relief.

But entirely aside from the merits of this position, the courts below were correct because he has had his day in court —not once but twice. If he was not satisfied with the decree in this respect, he should have appealed. It is no answer for the petitioner to say that he is not concerned with appeal but is following the well recognized procedure of moving to modify an equitable decree because of change in circumstances. He simply is not doing that. When he asserts, as in his first question, that the point at issue is whether exhibitors are entitled to be protected by court decree from petitioner's first-run competition, he is arguing that Judge Cecil's decree —in what it provided and in what it did not provide—is wrong as a matter of law and has been wrong ever since 1955. When he poses the thesis in his second question that provisions of an antitrust decree which are contrary to the public policy of the antitrust laws may be revised several years later through a petition for modification, he is again arguing that the trial court's decree was wrong because contrary to law and should now be corrected. And again when in his third question he suggests that a petitioner who was granted only part of the relief he sought may later obtain the relief to which he was entitled but was denied, he is still contending that there was error in the original decree;

and that basic contention is not altered by an oblique reference to changed circumstances.

No one disputes the general provision that an injunction decree is subject to modification where circumstances require. The point is that petitioner did not seek modification of a decree so as to mold an injunction in such a fashion as is required by changed circumstances in order to grant him relief to which he was entitled; he is seeking, under the guise of modification, a decree granting him relief to which he was not entitled and which was denied him on the basis of the determination of the trial court and his formal confession of judgment.

United States v. Swift & Co., 286 U. S. 106, 52 S. Ct. 460, 76 L. Ed. 999, laid down the historic principle:

> "We are not at liberty to reverse under the guise of readjusting."

The United States Court of Appeals for the Second Circuit, in dealing with an application for a supplemental injunction in *Armstrong v. DeForest Radio Telephone & Telegraph, 10 F. 2d 727*, enunciated the same principle:

> "[Referring to the use of injunction or contempt proceedings] The first thing to be done is to ascertain exactly what was decided according to the opinions filed. As between the parties, whatever was there found is final. The facts as between the parties are not open to further examination, and it is improper to turn either a contempt proceeding or an application for supplemental injunction into an inquiry whether the court was wrong, or whether some hole or omission can be discovered in its opinion."

Furthermore, petitioner has had a second day in court (albeit over the opposition of respondents) on this very point

as to whether he was entitled to a modification of the decree on the basis of the closing of the Kirby Theatre. In the 1956 proceedings initiated by a distributor, petitioner then contended through the affidavit of his right-hand man, Sachs (R. 81) and through his own affidavit (R. 84) that in any modification of the injunction he was entitled to injunctive relief as against the Loew's State, Metropolitan and Majestic Theatres, and he proposed to the court just such a modification (R. 86-87). Though no formal motion was filed in open court, by memorandum petitioner sought the very relief which he now seeks when there had already happened the same, the one, and the only factual change of conditions (namely, the closing of the Kirby Theatre) which he now asserts. This he should not be permitted to do again. As the *Restatement of Judgments*, Section 1, Page 9, states:

> "Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them."

Finally, if it should be assumed that petitioner can relitigate this issue on which he has confessed judgment and on which the trial judge held against him, and if he can again attempt to secure this relief despite his unsuccessful efforts on the same point in 1956, he is confronted with the fact that the one circumstance to which he points as a basis for modification, namely, the closing of the Kirby Theatre, necessarily, unavoidably, and inevitably helped him, rather than

hurt him. Every witness who testified in the case agreed that the Kirby, though a first-run house, occupied a lesser position in the exhibition field than the Loew's State, Metropolitan and Majestic and exhibited product that could not find a place in one of the big houses (R. 47-55). Petitioner in substance alleged the same thing in his complaint (R. 30-31). Since for reasons everyone considered valid each distributor preferred a run in the three houses named, it was only if no run was obtainable in one of them that a first run was sought in the Kirby and other theatres (including always petitioner's Delman pursuant to the injunction). The elimination of the Kirby obviously helped the Delman. The Kirby's production did not go to the three big houses for exhibition; it had already been tendered to them. The Kirby product after its closing was thus available for the Delman and other houses. The statistics show this is exactly what happened (R. 141-229). After the Kirby closed, the Delman began showing more, not fewer, first-run pictures. Its first-run business increased measurably in importance. Petitioner's case, built entirely upon the closing of the Kirby, collapses upon the undisputed showing that his first-run position has improved, not suffered, since that event. Actually, no showing or exhibits are necessary to establish this; mathematics prove it. Subtract one theatre, and the remaining are necessarily better off.

2. *The decision below is not in conflict with any decision of the Court of Appeals for the Seventh Circuit.*

Petitioner does not assert any actual conflict. His contention is that there is a conflict "in principle". He predicates this argument upon the ground that under the terms of

the decree the Delman is "prevented" from competing with the three downtown houses. This just is not so. No theatre of any respondent is protected by any decree. The distributors are free to license their pictures as they choose. To twist a refusal to issue an injunction favoring petitioner's Delman into an injunction protecting other theatres is impossible. There is no quarrel with the holding in *Bigelow v. RKO-Radio Pictures, et al., 162 F. 2d 520*, and *Milwaukee Towne Corp. v. Loew's Inc., 190 F. 2d 561*. They hold that parties are not entitled to be protected by court decree in a preferred playing position. That hasn't happened here, and no exhibitor respondent is given any protection, benefit, or playing position of any kind by the court's decree.

CONCLUSION

There are no adequate reasons either given by petitioner or existing in this case, for granting a writ.

As provided in Rule 19 of the Supreme Court Rules, a review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Petitioner refers to the public policy of the antitrust laws but in no way develops how such an issue is involved in the courts refusing him a rehearing on a matter already twice considered. No contention is made that the Court of Appeals decided an important question of federal law or that this decision has conflicted with applicable decisions of this Court, nor that its decision is such a departure as to call for an exercise of this

Court's power of supervision; nor has petitioner shown any conflict, as a matter of principle or otherwise, with the decision of other courts of appeal. The petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this brief were upon the 22 day of March, 1962, mailed with proper postage prepaid to Thomas C. McConnell and Francis J. McConnell, 134 South LaSalle Street, Chicago, Illinois, counsel for petitioner, and to William R. Brown and Baker, Botts, Shepherd & Coates, 16th Floor Esperson Building, Houston 2, Texas, and Donovan, Leisure, Newton & Irvine, Two Wall Street, New York 5, New York, counsel for distributor respondents.

JOS. IRION WORSHAM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 770

I. B. ADELMAN,

Petitioner,

v.

PARAMOUNT PICTURES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR DISTRIBUTOR RESPONDENTS IN OPPOSITION

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ERRORS IN PETITIONER'S STATEMENT OF QUESTIONS PRESENTED

These respondents say that the "Questions Presented" are not correctly set forth in the section so entitled, appearing on page 2 of petitioner's brief, for the following reasons:

1. Petitioner's statement of the first question erroneously assumes that there has been a finding of a wrongful monopoly upon which the relief petitioner seeks could be properly founded; and the statement is further erroneous in that it assumes that a decree has been entered which gives protection against competition.

2. The statement of the second question incorrectly assumes that a decree has been entered which contains provisions contrary to the public policy of the antitrust laws.

3. The statement of the third question assumes that petitioner won all material aspects of the antitrust suit and that a valid case of changed circumstances has been shown, neither of which is true.

QUESTIONS ACTUALLY PRESENTED AND REASONS WHY CERTIORARI SHOULD BE DENIED

I. There has been no adjudication against respondents upon which the injunction petitioner seeks could be founded and furthermore the granting of such an injunction is precluded because of petitioner's failure to take a timely appeal upon the entry of the original decree and also because of principles of estoppel and res judicata.

II. The instant decree does not bar petitioner from competing as a first-run theater, does not protect anyone from competition, and is not contrary to the policy of the antitrust laws.

III. The matters involved are not of sufficient public importance to warrant the allowance of the writ under Rule 19(1).

STATEMENT OF THE CASE

These respondents say that petitioner's "Statement of the Case" is not sufficient to inform the Court of the basic facts here involved. It is believed that a chronological summary of prior proceedings will be helpful.

Suit for treble damages and an injunction under the antitrust laws was filed March 29, 1948 (R. 1, 8). There was a jury trial in Houston June 6, 1955, to July 8, 1955 (R. 67, 257). Based on plaintiff's concession in open Court (R. 256-257) the jury was instructed "plaintiff has conceded that he is not entitled to compete for first run * * * against the Loew's State Theater, the Majestic Theater, and the Metropolitan Theater (the three large downtown theaters) * * *" (R. 263). A verdict for $20,000 was returned (R. 67).

A separate hearing on equitable relief was held August 22, 1955 (R. 283) and here plaintiff sought to enjoin the distributors from denying him an equal opportunity to compete "for any exclusive run" (R. 61, 286). The Court on September 16, 1955, entered a judgment for treble damages and granted an injunction but specifically excluded the three large downtown theaters in question from the injunction (R. 67 at 68). There was no appeal.

On February 19, 1957, on motion of the distributor-defendants, the decree was modified to clarify licensing rights as to non-exclusive or multiple first runs (R. 94). At the hearing on this matter plaintiff renewed his effort to obtain an injunction applicable to the large downtown theaters (R. 75, 81, 85). Again he was unsuccessful but did not appeal (R. 94). In these proceedings he placed no reliance upon the closing of the Kirby Theater which at the time of

the modification had been out of business for approximately ten months (R. 248-251).

On May 9, 1958, petitioner filed his present petition to "modify" the decree, seeking again to obtain the previously refused injunction as to the three large downtown theaters (R. 96). In an opinion dated April 1, 1960, the District Court refused the "modification" (182 F. Supp. 217) and the Court of Appeals affirmed (296 F. 2d 308).

Petitioner's "Statement of the Case" is misleading because throughout he labels himself as the "successful party" on all material antitrust issues (Petitioner's Brief, p. 3; see also pp. 10 and 11). He does not disclose the fact that on the prior jury trial he admitted in open court that he had no basis for claiming that he had been wrongfully excluded from competing with the three downtown theaters here involved (R. 256), that the trial Judge by affirmative instructions withdrew such theaters from consideration by the jury (R. 263), and that on the subsequent hearing for equitable relief the trial Judge specifically declined to make findings in petitioner's favor as to such theaters (R. 64-65, Findings 18 and 19; R. 66, Conclusions 1 and 3).

Petitioner makes reference to the closing of the Kirby Theater as a changed circumstance sufficient on which to base a modification of the decree (Petitioner's Brief, p. 5). He does not, however, disclose the fact that he has had his day in Court on this issue. As above noted, *before* his present petition for modification was filed, but *after* the Kirby Theater was closed, the trial Court had under consideration another petition for modification (R. 70-74), and did modify the decree (R. 94-96), at which time petitioner was before the Court contending for exactly the same relief as he now seeks, but without then relying upon the claimed effect of the closing of the Kirby Theater (R. 75-81, 81-84, and 85-90). Petitioner does not disclose that it was this

failure to raise any issue as to the claimed effect of the closing of the Kirby Theater which gave rise to the Court's finding of res judicata and estoppel on this phase of the matter (R. 248-251).

Petitioner's statement also erroneously pictures the decree as protecting and preserving a "first run monopoly" (Petitioner's Brief, pp. 10 and 11). The decree does no such thing. As to the three theaters here involved the situation is exactly the same as if the decree had never been entered. The plaintiff has simply failed in his effort to have these three theaters subjected to an injunction (R. 61 and 68). The absence of a decree as to these theaters does not, however, prevent competition nor does it protect or preserve a monopoly.

Petitioner presents his argument under two points, to each of which respondents will separately reply.

ARGUMENT

I.

(Reply to First Point)

There has been no adjudication against respondents upon which the injunction petitioner seeks could be founded and furthermore the granting of such an injunction is precluded because of petitioner's failure to take a timely appeal upon the entry of the original decree and also because of principles of estoppel and res judicata.

Absence of Adjudication Against Respondents

Petitioner argues his first point representing himself to be the "successful plaintiff" (Petitioner's Brief, p. 8) who "won his antitrust case" (Petitioner's Brief, p. 9). His objective is to subject Houston's three large downtown theaters, Loew's State, the Metropolitan and the Majestic, to

an injunction (Petitioner's Brief, p. 5). Both the District Court and the Court of Appeals have held that as to these three theaters petitioner was not the successful plaintiff and that as to such theaters petitioner did not win his anti-trust case. Such holdings correctly preclude the injunction petitioner seeks.

The fact that petitioner's victory was not a total one is rather dramatically demonstrated by the fact that he sued for $2,436,000 (R. 46) and recovered $60,000, the sum of $20,000 trebled (R. 67). Plaintiff was not successful as to the three downtown theatres, Loew's State, the Metropolitan and the Majestic. Upon the original trial before the jury each of the distributors took the position that in the exercise of its sound business judgment it had concluded that it was to its financial advantage for its films to be first exhibited in one of the large downtown theaters. Evidence was offered to show that such theaters were larger and more lavishly furnished and equipped. It was pointed out that original exhibition in a downtown house built the prestige of a picture. Through such an exhibition not only the theater patrons but also the subsequent run exhibitors, both in the Houston suburban area and in other municipalities in the trade territory, would recognize the picture as a desirable attraction. All of this was shown to be materially beneficial to the distributors because it would substantially increase the film rental revenue the distributor would receive from subsequent run exhibitions both in Houston and the surrounding area. It was shown that if a picture was first exhibited in a theater such as petitioner's Delman the picture after its exhibition there for practical purposes would be dead. The picture would not be accepted by either the public or other exhibitors as a major attraction. Receipts from other showings would be disappointing and the number of subsequent run exhibitors who would be interested in playing the film would be materially reduced.

(R. 53-54 — only excerpts of the testimony on the jury trial are in the printed record — for similar testimony given on the hearing for equitable relief see R. 373-374, 430-431, 455-456, 474-475, 487 and 511.)

By the time the jury trial was concluded petitioner had conceded on the record that he did not compete with the three principal downtown theaters for major first run astractions and the trial Judge so charged the jury. The record discloses that the following took place during the preparation of the Court's charge (R. 256-257):

"The Court:

"In the first paragraph • • • I have eliminated the phrase 'in a downtown theatre' and have substituted therefor 'in the Majestic, Loew's and Metropolitan Theatres.'

" • • •

"Mr. McCorquodale (Counsel for Petitioner):

"In view of the fact that *we have conceded we don't compete with those big three*[1] for the pictures, I am just wondering if we need that?

"(Discussion.)

"The Court:

"I am going to eliminate the paragraph. They are not contending for first run in this case.

"Mr. Binion (Counsel for Exhibitors):

"Your Honor, I think we should have an instruction that they are not.

---

[1] Unless otherwise noted where emphasis appears in this brief such has been added by the writers.

"The Court:

"I am going to eliminate it. Mr. Reporter, and I am going to add this — I am going to charge as follows — put it on a separate sheet:

"You are instructed that the plaintiff has conceded that he is not entitled to compete[2] for first run exhibition in the City of Houston against the Loew's State Theatre, the Majestic Theatre, and the Metropolitan Theatre, but does contend that he is entitled to compete for first run exhibition against the Kirby Theatre and any other theatre operated by the exhibitor defendants." (See also R. 263).

In view of the foregoing affirmative instruction it certainly cannot be contended that the jury made an unfavorable finding against respondents as to these three theaters which were specifically excluded from its consideration.

---

[2] In a footnote appearing on page 6 of his brief petitioner is very critical of that portion of the Court of Appeals' opinion wherein it was stated: "It was expressly determined that * * * (the Delman) was not in competition with appellees' Loew's State, Metropolitan or Majestic Theaters." Petitioner implies that such is in conflict with Judge Cecil's findings and statements appearing in the brief of the exhibitor-respondents. As noted above, the Court's statement is almost word for word the same as the concession made by petitioner's counsel during the trial and the charge which Judge Cecil gave to the jury. Petitioner's attempt to develop a conflict between such statement and the brief of the exhibitor-respondents is simply a play on words. The word "competition" has been used to refer to different things. In the concession made by petitioner's counsel and in Judge Cecil's charge to the jury, quoted above, as well as in the Court of Appeals' opinion, the word was used in referring to competition for first run film. In the exhibitors' brief the word had reference to competition between theaters for patronage. There is a material difference. It may be that because of its size and location a neighborhood theater, such as the Delman, is not in a position to compete with the downtown theaters for first run film since it cannot offer sufficiently attractive terms as to film rental. At the same time the downtown theater will be in competition with the neighborhood theater for patronage because the downtown theater draws patrons from all neighborhoods.

After the jury trial was concluded the Court had a separate hearing on equitable relief. At this hearing petitioner conceded that for the period of time considered by the jury he had no basis for an injunction against the large downtown theaters but again sought such an injunction on the claimed "as of now situation". This is clear from the following exchange between counsel for petitioner and the Court (R. 286):

> "THE COURT: Was it said upon the trial of this case that the Delman doesn't compete for first run against Loew's State and the Metropolitan?
>
> "MR. WRIGHT (Counsel for Petitioner): That is true. That was as of that period. That concession was certainly made insofar as the award of any damages on a comparison with those theaters was based. But I don't think, your honor, that that concession, for the purpose of the jury submission, prevents us from now contending that *as of now* in the Delman, * * * the situation is this, as I see it:" [Counsel then continued with an argument that exhibitions in the River Oaks Theater demonstrated that a theater without a downtown location could occasionally compete with the large downtown theaters for a top picture by offering extended playing time.]

After the hearing on equitable relief the Court, however, specifically declined to extend the jury's finding and refused the requested injunction as to the Metropolitan, Majestic and Loew's State Theaters. In interpreting the decree it must be remembered that at the time the same was entered there were five theaters in Houston operating on a first run basis. The trial Judge was careful in every instance to make it plain that no violation of the antitrust laws was found with respect to three of these theaters (Loew's State, the Metropolitan and the Majestic), and that any finding

against the defendants went no further than the jury finding and was limited to the other two theaters (the Kirby and the River Oaks). The Court's Findings of Fact clarify this. There the following appears:

> "8. The defendant Interstate Circuit is successfully operating the River Oaks Theater in Houston upon an *exclusive first run* art policy and has successfully exhibited some of defendants' 'A' pictures for extended engagements of two weeks or more.
>
> "9. The only *other theaters* in Houston operating on a first run policy are Interstate's Metropolitan, Majestic and Kirby Theaters and Loew's State, all of which ordinarily exhibit a film for one week. (R. 62-63.)
>
> " * * *
>
> "19. Unless the plaintiff is given an equal opportunity to compete *with the Kirby*[3] *and River Oaks Theaters* for an exclusive first run of all films which the distributor-defendants may offer for exhibition in Houston *and do not license on such run to Loew's State, Majestic or Metropolitan Theaters*, the defendants' conspiracy will continue and plaintiff will suffer substantial irreparabe injury." (R. 65.)

Equal care was exercised by the Court in limiting his Conclusions of Law. The following should be noted:

> "1. The defendants have been found *by the jury's verdict* in this case to have violated Sections 1 and 2 of the Sherman Act by *conspiring* with each other to monopolize the first run and second run exhibition of films in Houston, Texas. (R. 66.)
>
> " * * *

[3] The evidence showed that the Kirby normally exhibited first run film that had been rejected by the Metropolitan, Majestic and Loew's State (R. 47-48, 49-50, 50-51, 51-52 and 52-55). See petitioner's admission to this effect in Sachs' affidavit (R. 75 at 79).

"3. The *foregoing* conspiracy has not ended, and the plaintiff is threatened with further injury *therefrom* unless an injunction is issued herein." (R. 66.)

The "foregoing conspiracy" referred to by the trial Judge was specifically limited to that "found by the jury's verdict" which could not possibly have included a conspiracy relative to the Loew's State, Metropolitan and Majestic Theaters since the Court by his charge, quoted above, affirmatively withdrew from the consideration of the jury the practices relative to such theaters with the instruction that "the plaintiff has conceded that he is not entitled to compete for first run exhibition in the City of Houston against Loew's State Theater, the Metropolitan Theater and the Majestic Theater".

The trial Judge ended his Conclusions of Law with the following:

"4. In order to prevent irreparable injury to the plaintiff and to end *such conspiracy* (a) all of the defendants should be enjoined from continuing *that conspiracy*, (b) the distributor-defendants should be enjoined from denying to the plaintiff an equal opportunity with the exhibitor-defendants to compete for an exclusive first run of any feature film offered in Houston, Texas, *except those licensed on such run to the Loew's State, Metropolitan or Majestic Theaters*. * * *." (R. 66.)

Again, "such conspiracy" and "that conspiracy" specifically referred to that "found by the jury's verdict" which as above noted did not include conduct relative to the Loew's State, Metropolitan or Majestic Theaters. It will be further noted that to make this abundantly clear the trial Judge specifically excluded such theaters from the injunction granted. (Decree, Paragraph 3-A, R. 68.)

There is no doubt about the specific nature of the trial Judge's rulings against petitioner as to the Loew's State,

Metropolitan and Majestic Theaters. Those rulings emphatically denied that which petitioner sought. For example, petitioner's proposed finding No. 22 was directed against all theaters and all runs, the requested finding being against "Interstate's Theaters and Loew's State for such exclusive runs as the distributor-defendants may offer" (R. 59); however, the Court's finding in response excluded first runs licensed "on such run to Loew's State, Majestic or Metropolitan Theaters" (Finding 19, R. 65). Again petitioner's proposed conclusion of law No. 4 was to include "any exclusive run offered in Houston" (R. 60); however, in the Court's conclusion of law No. 4 he again excluded first runs "licensed on such run to Loew's State, Metropolitan or Majestic Theaters" (R. 66). The injunction proposed by petitioner was as follows:

> "Each of the distributor-defendants is hereby enjoined from denying to the plaintiff an equal opportunity with the exhibitor-defendants to compete for any exclusive run of a feature film offered in Houston." (R. 61.)

In response to this proposal the injunction allowed was as follows:

> "That each of the distributor-defendants * * * are hereby enjoined from:
>
> "A. Denying to the plaintiff an equal opportunity with the exhibitor-defendants * * * to compete for an exclusive first run of any feature film offered in Houston, Texas, *except such films as may be licensed for first run exhibition in the Loew's State, Metropolitan, or Majestic Theaters;* * * *." (Judgment, Paragraph 3, R. 68.)

In the face of the foregoing record it is difficult to understand how petitioner can class himself without limitation as "the successful plaintiff" who "won his antitrust case".

Failure to Appeal

Petitioner took no appeal from the adverse judgment but sought to avoid the effect of the same by nothing more than his present petition to modify the decree, filed more than two years later (R. 96), supported by nothing more than his own conclusory affidavit (R. 133-141). The District Court correctly held that the prior adjudication was binding. The District Court's specific ruling was as follows:

> "The record in this case is clear. At every juncture plaintiff contended that he should be accorded the right to compete against the Loew's State, Metropolitan, and Majestic Theatres. At ever juncture he lost. From his defeat he took no appeal. He now proposes that the prior adjudication be disregarded and that he be accorded the relief heretofore specifically denied. But the prior adjudication is binding on plaintiff. * * *
>
> "An examination of the record clearly shows that the Court found no violation of the antitrust laws with respect to the Loew's State, Metropolitan, and Majestic Theatres and that any finding against defendants was limited to the two other first-run theatres, the Kirby and River Oaks. * * * (R. 242-243.)
>
> * * * *
>
> "From the foregoing it is apparent that if plaintiff has any cause for complaint against defendants as to licensing practices in the Loew's State, Metropolitan, and Majestic Theatres, such must be founded upon a new cause of action arising subsequent to the decree herein. Down through the proceedings, every adjudication as to these theatres has been favorable to defendants. The accepted way for the assertion of new causes of action is through the filing of a new law suit, not through a petition to modify the decree." (R. 245-246.)

The Court of Appeals reached the same conclusion, correctly holding as follows:

"The District Court, having retained jurisdiction, could entertain a petition for the modification of the injunction, and it could no doubt have exercised such jurisdiction even though it had not been expressly reserved. United States v. Swift & Co., 286 U. S. 106, 52 S. Ct. 460, 76 L. Ed. 999. It does not follow, however, that issues which have been submitted to the court and have been decided by it may be relitigated upon an application for modification. A review of the determination of such issues and the correction of an erroneous decision may be accomplished by the established appellate procedures. * * * any modification of the injunction such as is now sought would be a reversal of the determination of an issue decided by the court and accepted by the appellant."[4]

Closing of Kirby Theater

It is respectfully submitted that petitioner's failure to appeal from the original decree wherein his injunction was refused precluded the granting of such injunction on his present petition without regard to his contentions about a modification due to changed circumstances. Petitioner seeks to ignore the fact that in the leading case on th subject, *United States* v. *Swift*, 286 U. S. 106, 119, (1932), this Court held:

" * * * We are not at liberty to reverse under the guise of readjusting."

Here petitioner is not seeking to modify an existing injunction but rather to obtain an injunction previously refused because of his failure to establish a basis for injunctive relief with respect to the theaters in question. Petitioner wants an injunction as to Loew's State, the Majestic and the Metropolitan Theaters which injunction not only has never been granted but on prior proceedings, as shown above,

[4] The opinion will be found in 296 F. 2d 308, 309 (CCA 5th, 1961).

was declined although specifically sought by petitioner. It is thus readily apparent that petitioner is not seeking to "modify" or "readjust" but on the contrary he is seeking to "reverse" the prior denial of the injunction. He has never obtained the prerequisite findings for an injunction. This is a basic point. The procedure sought to be employed is not appropriate. The District Court and the Court of Appeals have both so held.

Completely apart from the foregoing it is, however, additionally true that prior to the filing on May 9, 1958 (R. 96) of the present petition for modification petitioner had already had his day in Court as to the effect of the closing of the Kirby Theater. This stems from the fact that the distributors previously, on October 9, 1956, filed a motion for modification of the decree in order to clarify their right to license pictures on non-exclusive or multiple first runs (R. 70-74). Petitioner appeared at the hearing held on the matter and through a formal memorandum filed by his attorney (R. 85-90), an affidavit by his booker (R. 75-81), and an affidavit of his own (R. 81-84), he sought to have the same provision of the decree as that now involved, paragraph 3-A, modified in exactly the same way as he proposed on the petition which is now before the Court. The trial Court on such prior proceeding, after a hearing, modified the decree as requested by the distributors, the order of modification being dated February 19, 1957 (R. 94-96). At this time the Kirby Theater had been closed for ten months, but the trial Judge did not grant petitioner the injunction against the Metropolitan, Majestic and Loew's State Theaters which he was then seeking for the second time. When petitioner's present petition came before the District Court it was there held that the prior modification proceeding gave petitioner a reasonable opportunity to present any claim for modification predicated upon the effect of the closing of the Kirby Theater and that this estopped him

from subsequently assigning that closing as a reason for modifying the decree. The District Judge's able disposition of this point was as follows:

> "If plaintiff has any ground for relief, it must be contained in his pleading. The only pleading he has before the court is his petition to modify the decree. There is no new matter contained therein except allegations concerning the Sharpstown Theatre (Paragraph 6), the pertinent parts of which were denied by defendants and on which plaintiff offers no proof, and further allegations (Paragraph 3) relative to the closing of the Kirby Theatre. The conclusory statements in plaintiff's affidavit do not constitute new matter. Plaintiff concedes that the Kirby Theatre was closed on April 16, 1956 [R. 118] * * * and the petition to modify the decree (Paragraph 6) affirmatively demonstrates that more than ten months thereafter the court had under consideration and modified Paragraph 3-A of the decree, the very paragraph now under consideration.
>
> "The record discloses that plaintiff appeared at the hearing held on the matter, filed a four-page memorandum signed by his then attorney, Robert L. Wright, Esq., [R. 85-90], a seven-page affidavit signed by his booker, Harry Sachs, [R. 75-81], and a three-page affidavit which plaintiff himself signed [R. 81-4]. Despite the fact that the Kirby Theatre had been closed for months and the further fact that said theatre specifically was mentioned (see pg. 5 [R. 79, Par. 4] of Sachs' affidavit), there is no allegation in any of these documents that the Kirby Theatre had been closed for months and that such closing had an adverse effect upon plaintiff's business. The relief sought by plaintiff was exactly the same then as it is now, but he did not assign the closing of the Kirby as a ground for such relief. The following statement of plaintiff's then position appears on pages 2 and 3 of the memorandum filed in December, 1956, by his attorney:

"' * * * The existing paragraph 3-A should therefore be modified to read as follows:

"'Denying to the plaintiff an equal opportunity with the exhibitor-defendants * * * to compete for an exclusive first run of any feature film offered in Houston, Texas; * * *'

"By its order of February 19, 1957, the court modified Paragraph 3-A of the decree to permit multiple first-run distribution as sought by the distributor defendants; however, it again ruled against plaintiff with respect to the Loew's State, Metropolitan, and Majestic Theatres by refusing to adopt the amendment, quoted above, contended for by plaintiff.

"Again the principles of res judicata, discussed above, become applicable. They preclude plaintiff from seeking relief now on the basis of the closing of the Kirby Theatre, since he failed to assert such a claim when he was in court with an opportunity to do so months after such theatre was closed. In the Restatement of Judgments (American Law Institute 1942, Secs. 1 and 63), the following applicable rules are announced:

"'Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.' (Section 1, p. 9).

"'The principle stated in this section is applicable although the unsuccessful party in fact had no knowledge of the grounds for setting aside or reversing the judgment until his right was lost. The fact that under the particular circumstances the unsuccessful party cannot by direct proceedings in the action have the judgment set aside may cause hardship to him; but public policy requires that the hardship in the par-

ticular case should yield to the general public interest in favor of putting an end to litigation.' (Section 1, comment b, pp. 10-11.)

"'Where a judgment on the merits is rendered in favor of the defendant, the plaintiff is precluded from subsequently maintaining an action on the same cause of action although he presents a ground for the relief asked other than those presented in the original action. * * *' (Section 63, pp. 257-8).

"'The rule has the effect of coercing the plaintiff to present all of his grounds for recovery in the first proceeding, which is similar to the coercion upon the defendant to produce all of his defenses to the claim set up by the plaintiff.' (Section 63, comment a, p. 258.)

"From the record it is obvious that any issue as to the effect of the closing of the Kirby Theatre is an afterthought which comes too late." (R. 248-251.)

It should be noted that in the Restatement, quoted by the District Judge, it is stated that the principle "is applicable although the unsuccessful party in fact had no knowledge of the grounds for setting aside or reversing the judgment until his right to take further proceedings in the action was lost". The opinion points out that the Kirby Theater was mentioned in one of the affidavits filed by petitioner. Actually the affidavit in question went further and referred to the *closing* of the Kirby Theater. In such affidavit, that of petitioner's booker, Harry Sachs, the following is found (R. 75 at page 79):

"* * * I do not believe, however, that their (the distributors) claim is made in good faith as a basis for modification of Paragraph 3-A of the decree. They (the distributors) only reached this conclusion *after Interstate's Kirby Theatre was converted to commercial use.* Until that occurred *last spring*, all of these

defendants were content to put their B pictures into the Kirby for an exclusive first run * * *."

Authorities demonstrate that the ruling of the District Judge was entirely correct. With the claim which petitioner had theretofore unsuccessfully brought before the Court on two separate occasions petitioner sought exactly the same relief and on each occasion the same cause of action

---

[5] Since the Kirby was exhibiting "B" (second choice) pictures its closing could have no adverse effect upon petitioner's operations. The conclusory statements appearing on pages 7-8 of Petitioner's Brief to the effect that the decree opened up one-fourth of the first run product to petitioner and that such was cut off when the Kirby closed is, as noted above, contradicted by petitioner's own record. All of the evidence was to the effect that the distributors first tried to get their pictures shown in the Metropolitan, the Majestic or the Loew's State (R. 47-48, 49-50, 50-51, 51-52 and 52-55). If the distributors could not get such an engagement they would then try the Kirby. (R. 48, 50, 51, 52, 54-55). The flow of pictures would be downward from the larger theaters. The Kirby was downstream from the Majestic, Metropolitan and Loew's State. The effect to be anticipated from the closing of the Kirby would be to make more pictures available to the Delman. All of the proof before the Court showed that petitioner's Delman exhibited first runs a greater percentage of the time after the Kirby closed than it did before — 25.0% for such first runs before the Kirby closing but 68.9% after the closing. (See Appendix to this Brief, particularly Table No. 3.) Petitioner filed no contrary proof. The Court's rules, Rule 25, Rules of the U. S. District Court, S.D. Tex., 11 Fed. Rule Service 1016, require that all evidence supporting a motion be filed with the motion and "that if such matters shall, because of failure to file briefs, affidavits, etc., * * * not have been properly prepared for submission, the Court may, for that cause * * * dismiss same". It should also be noted the record demonstrates that early in the proceedings petitioner had conceded the Kirby was not of prime importance. At the hearing on equitable relief held on August 22, 1955 (R. 283), counsel for petitioner said: "* * * the River Oaks rather than the Kirby has become the third Interstate Theater in terms of gross receipts. * * *. It has replaced the Kirby as Interstate's third highest grossing theater" (R. 285). Also petitioner himself then testified that the River Oaks was outgrossing the Kirby (R. 299).

was involved. *Baltimore S. S. Co.* v. *Phillips*, 274 U.S. 316, 321 (1927); *F. L. Mendez & Co.* v. *General Motors Corp.*, 161 Fed. 2d 695, 698 (CCA 7th, 1947); *Williamson* v. *Columbia Gas & Elec. Corp.*, 91 F. Supp. 874 (D. Del. 1950), aff'd 186 Fed. 2d 464 (CCA 3rd, 1950), cert. den. 341 U.S. 921 (1951). When petitioner was brought before the Court on the distributors' petition for modification Rule 13, Federal Rules of Civil Procedure, made it mandatory that petitioner support his counterclaim with any contentions to be predicated upon the closing of the Kirby Theater. In *Williamson* v. *Columbia Gas & Elec. Corp.*, *supra*, the Court said (91 F. Supp. 877):

> "• • • If a suit involves the same parties and the same cause of action as in a suit which has been finally adjudicated, the parties will be bound not only by what was actually litigated and determined, *but also by those germane matters which might, with propriety, have been litigated and determined.*"

For other cases illustrating the full extent of compulsory counterclaims see *Commissioner* v. *Sunnen*, 333 U. S. 591, 597 (1948); *Eastern Transportation Co.* v. *U. S.*, 159 Fed. 2d 349, 351 (CCA 2nd, 1947); *Parmelee* v. *Chicago Eye Shield Co.*, 157 Fed. 2d 582, 586 (CCA 8th, 1946); *United States* v. *Eastport S. S Corp.*, 255 Fed. 2d 795, 801 (CCA 2nd, 1958); *E. J. Korvette Co., Inc.*, v. *Parker Pen Co.*, 17 F.R.D. 267, 268 (S.D. N.Y. 1955).

Respondents believe the District Judge was entirely correct in his conclusion "that any issue as to the effect of the closing of the Kirby Theater is an afterthought which comes too late". (R. 251.)

II.

(Reply to Second Point)

The instant decree does not bar petitioner from competing as a first run theater, does not protect anyone from competition, and is not contrary to the policy of the anti-trust laws.

In his second point Petitioner has come forward with the absurd conclusion: "Under the terms of the decree and the holding of the Court below, petitioner's Delman is prevented from competing with exhibitor-respondents' three first-run theaters." He also refers to: "The holding of the Court below that petitioner's Delman is not entitled to compete with Loew's State, the Metropolitan and Majestic Theaters." (Petitioner's brief, pp. 9, 10).

The decree contains no such terms and the Courts below have made no such holdings. Petitioner's reasoning is completely muddled. It can be straightened out only by a fresh start.

In the beginning each distributor owns its copyrighted films and can license them to whomever it pleases. Petitioner sues and says a conspiracy exists to prefer the exhibitor-defendants and asks that the distributors be enjoined from denying him an equal opportunity with the exhibitor-defendants to compete for each film. In other words, any time a distributor offers a film to one of the exhibitor-defendants it must also offer it to the plaintiff. Each distributor denies that it is a party to any conspiracy and for varying reasons says that it has offered its pictures to the Metropolitan, Majestic or Loew's State not because of any conspiracy but because it is to its financial advantage to sell them there — such theaters are larger, draw from a wider area, build the prestige of the picture and enhance the possibility of more revenue from subsequent run exhi-

bitions (R. 53-54, 373-374, 430-431, 445-446, 474-475, 487, 511). The Court simply refuses the injunction. This obviously amounts to a finding of no conspiracy as to such theaters because had a conspiracy been found these theaters would have been subjected to the injunction. As to this aspect of respondents' business the Court has left the parties exactly where he found them — free to deal with each other as they see fit but still subject to all applicable laws.

Petitioner's entire argument is a play on words. He attempts to twist the refusal of an injunction into a denial of a right to compete. The decree does no such thing. It could have as well been worded: "The request for an injunction as to the Loew's State, Metropolitan and Majestic Theaters is refused."

The distributors certainly do not concede that the decree vests any playing position, preferred or otherwise, in the exhibitor-respondents. The decree clearly means simply that if a distributor deems its financial interests will be best served by selling a picture to one of the three downtown theaters it can do so without offering the same to the Delman. On the other hand, it is just as free to offer the picture to the Delman without going to one of the larger theaters. Should, however, a distributor at any time refrain from offering a picture to the Delman because of the existence of an unlawful conspiracy or combination in restraint of trade the Courts will be open to petitioner. Upon proof of any such unlawful conduct, the existence of which is denied, it is to be anticipated that relief would be prompt and effective.

III.

The matters involved are not of sufficient public importance to warrant the allowance of the writ under Rule 19(1).

Petitioner seeks to convey the impression that some matter of public policy under the antitrust laws is involved. Respondents say that this is not so. On the contrary the granting of the writ would do violence to well established precedents for the administration of justice.

Petitioner has not conducted this case as if it involved a matter of particular importance to him, much less to the public. It has been many times said that actions speak louder than words. If petitioner actually believed in his cause with the fervor he by his words attempts to picture, his actions would have been different in the following material particulars:

(1) He would not have conceded during the trial that his Delman Theater was not in a position to compete for first run films with the large downtown theaters (R. 256-257).

(2) When the Court declined (after listening to his evidence at the hearing on equitable relief) to give him the injunction he sought, he would have appealed (R. 61 and 68).

(3) When the distributors instituted proceedings to modify the decree he would have asserted the closing of the Kirby Theater as a basis for the unwarranted injunction he has always dreamed of (R. 70-73, 81-84, 85-89).

(4) When the Court declined his injunction at the distributors' hearing, again he would have appealed (R. 94).

(5) After instituting his present petition to "modify" the decree, he would not have waited for more than sixteen months before filing anything in support of the same (R. 96, 133, 232).

(6) He would have moved the submission of his own petition to "modify" rather than waiting for the distributor-defendants to do so (R. 232-233).

(7) He would have instituted a new suit to establish the existence of his claimed conspiracy rather than attempting through his present novel approach to twist adverse findings into a basis for the injunction repeatedly denied him (R. 246).

Petitioner's inconsistent actions perhaps demonstrate better than anything else the absence of merit. No element of public importance is present.

CONCLUSION

It is respectfully submitted that the disposition of this case below was in all things proper. For the lower Courts to have ruled otherwise would have been to permit petitioner to circumvent and in effect reverse the adjudications against him upon the basis of nothing more than a tardy motion and his own conclusory affidavit. As the District Judge said in his opinion: "If plaintiff has any cause for complaint • • • such must be founded upon a new cause of action arising subsequent to the decree herein. • • • The accepted way for the assertion of a new cause of action is through the filing of a new lawsuit, not through a petition to modify the decree" (R. 245-246).

This case depends primarily upon its own facts and was correctly decided below. No matter of public importance is involved. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this brief were upon the 26 day of March, 1962, delivered to Gaius G. Gannon, Jr., Esq., counsel for petitioner, and to Jack Binion, Esq., counsel for the exhibitor-respondents, and upon the same date copies were mailed to Thomas C. McConnell, Esq., Francis J. McConnell, Esq., and Messrs. McConnell, Paschen & Curtis, 134 S. LaSalle Street, Chicago 3, Illinois, additional counsel for petitioner, and to Jos. Irion Worsham, Esq., 1817 Republic National Bank Building, Dallas 1, Texas, additional counsel for the exhibitor-respondents, all by air mail, postage prepaid.

William R. Brown
Attorney for Distributor-Respondents

APPENDIX

TABLE NO. 1

FIRST RUN EXHIBITIONS OF DELMAN THEATRE DURING KIRBY THEATRE OPERATIONS (11/17/55 to 4/16/56)

Picture	Play Date	No. Days Played	Gross	Rental
Trail of Lonesome Pine Shepherd of the Hills	11/17-23/55	7	$ 2,020.75	$ 707.26
Big House U.S.A. Bullet For Joey	12/8-14/55	7	1,640.85	492.25
30 Seconds Over Tokyo A Guy Named Joe	12/21-28/55	8	2,115.00	727.55
Flame of Island Vanishing American	2/23-27/56	5	1,828.55	548.56
Night Mare Alley Where Sidewalk Ends	3/11-14/56	4	1,265.15	316.29
Queen Bee Inside Detroit	4/10-16/56	7	1,823.25	638.14 100.00
Totals		38	$ 10,693.53	$ 3,530.05

(Source: R. 145-148)

Note: The decree is dated September 16, 1955 (R. 67). The time period covered by this table begins with the first exhibition in the Delman of a first run picture *contracted* for *after* the decree and concludes with the closing of the Kirby Theater.

TABLE NO. 2

FIRST RUN EXHIBITIONS OF DELMAN THEATRE AFTER KIRBY THEATRE CLOSED (4/17/56 to 9/14/59)

Picture	Play Date	No. Days Played	Gross	Rental
Glory Naked Sea	4/17-23/56	7	$ 1,812.85	$ 775.00 75.00
There's Always Tomorrow Red Sundown	4/24-30/56	7	2,024.80	900.00
Slightly Scarlet Postmark For Danger	5/1-7/56	7	2,092.50	875.00 100.00
River Changes Steel Jungle	5/8-14/56	7	1,458.65	437.59
Black Tuesday Man Fish	5/22-28/56	7	1,499.45	449.83
Our Miss Brooks Top Banana	5/29-6/4/56	7	1,925.00	468.85 50.00
3 Bad Sisters Storm Fear	6/5-11/56	7	1,835.35	550.60
Naked Street Top Gun	6/28-7/3/56	6	1,919.95	575.98
Top of World Fort Yuma	7/7-10/56	4	1,421.30	436.39
Dallas Distant Drums	7/21-25/56	5	1,896.40	474.10
Killers Loose Quincanon Frontier Scout	7/28-8/1/56	5	2,080.90	624.27
Black Sheep Creeping Unknown	8/9-13/56	5	1,960.10	588.03
The Killing Nightmare	8/16-20/56	5	2,062.00	515.50
Rebel in Town Emergency Hospital	9/2-5/56	4	1,750.05	437.51 75.00
Annie Get Your Gun	9/16-19/56	4	801.00	240.30
While the City Sleeps Brain Machine	9/27-10/3/56	7	1,824.00	600.00 75.00

(Source: R. 149-158)

TABLE NO: 2 (Cont'd)

Picture	Play Date	No. Days Played	Gross	Rental
Two Years Before Mast Virginian	10/4-10/56	7	$ 1,948.00	$ 584.40
The Unconquered Leather Saint	10/11-17/56	7	2,007.80	602.34
Great Day in Morning Murder on Approval	10/18-23/56	6	1,559.40	467.82 75.00
Kiss Before Dying U.F.O.	10/28-31/56	4	1,086.70	271.67 75.00
World in My Corner Day of Fury.	11/8-14/56	7	1,558.75	467.62
These Wilder Years	11/15-21/56	7	1,669.45	500.84
Outside the Law Behind High Wall	11/25-28/56	4	968.80	290.64
High Noon Moon is Blue	12/2-5/56	4	1,407.40	351.77
Vagabond King Stratton Story	12/6-12/56	7	1,707.85	512.35 100.00
Storm Over Nile	12/16-19/56	4	809.90	202.48
Heidi and Peter Northwest Passage	12/20-24/56	5	878.65	219.66 100.00
Citizen Kane	1/1-7/57	7	3,050.00	915.00
Man From Del Rio The Boxx	1/10-14/57	5	1,500.40	450.12
Reprisal Cha Cha Boom	1/15-19/57	5	840.35	210.09
Boom Town	1/23-26/57	4	1,192.85	298.21
Yearling	1/27-30/57	4	957.30	100.00
Mutiny on Bounty	2/24-27/57	4	1,254.85	313.71
Silent World	3/28-4/29/57	33	17,773.00	5,601.70
3 Brave Men	4/30-5/6/57	7	3,274.30	750.90
Rebecca Third Man	5/7-13/57	7	3,739.20	1,121.76
Mr. Cory Kelly and Me	5/14-20/57	7	2,845.20	908.32 250.00

TABLE NO. 2 (Cont'd)

Picture	Play Date	No. Days Played	Gross	Rental
Green Dolphin Street Carmen Jones	5/28-6/2/57	6	$ 2,718.70	$ 667.17 50.00
Shootout on Medicine Bend Young Man With a Horn	6/3-9/57	7	2,592.95	748.88 100.00
Lost Horizon Joe Macbeth	6/10-16/57	7	2,508.70	602.17 100.00
*The Strange One The Killing	6/17-24/57	8	3,646.10	1,075.51 30.00
Monster Challenged World The Vampire	6/25-7/1/57	7	4,034.45	1,210.33
Public Pidgeon #1	7/2-8/57	7	5,177.45	2,070.98
Abandon Ship The Barbarian	7/9-15/57	7	3,447.00	1,034.10
The Brave One	7/16-29/57	14	9,337.95	3,366.60
Tarzan & Lost Safari	7/30-8/12/57	14	8,128.00	2,841.42
Trooper Hook Fury at Sundown	8/13-19/57	7	3,861.30	1,158.39
Man Who Turned to Stone Zombies of Moratav	8/20-26/57	7	3,690.20	1,291.57
Midnight Story Song of South	8/27-9/2/57	7	3,832.00	804.60 150.00
Seventh Sin Living Idol	9/3-9/57	7	2,432.00	729.60
Torero	9/10-23/57	14	7,368.10	2,339.40
Brother Rico Domino Kid	10/1-7/57	7	1,866.40	522.42
Tip On a Dead Jockey Decision Against Time	10/15-21/57	7	1,732.00	519.60
Flying Leathernecks Sea Devils	10/22-28/57	7	2,300.35	100.00
Gunsight Ridge Enemy From Space	10/29-11/4/57	7	2,175.30	652.59
Johnny Trouble James Dean Story	11/5-11/57	7	2,919.40	729.85

TABLE NO. 2 (Cont'd)

Picture	Play Date	No. Days Played	Gross	Rental
Quantez	11/12-18/57	7	$ 2,017.70	$ 504.42
Lonely Man	11/19-25/57	7	2,346.60	561.65
Gold of Naples				100.00
Sea Wife	11/26-12/2/57	7	2,352.80	921.12
Adventure Robinhood				50.00
Short Cut to Hell	12/3-9/57	7	1,431.80	100.00
Stowaway Girl				332.95
Action of Tiger	12/10-16/57	7	2,061.25	489.06
Hired Gun				
Black Scorpion	12/17-23/57	7	1,336.90	334.22
Black Patch				
Story of Esther Costello	12/24-31/57	8	3,198.20	1,400.00
Girl in Black Stockings	1/15-21/58	7	1,456.75	364.19
Satmo The Great				
King Solomon's Mine	1/22-2/24/58	34	24,453.25	6,113.46
Zero Hour	3/4-10/58	7	1,495.75	448.73
Decision at Sundown	3/11-17/58	7	2,000.40	500.10
Beyond Mombasa				
California	3/18-24-/58	7	1,933.50	483.37
Desert Fury				
The East Paradise	3/25-31/58	7	1,625.50	406.37
Hidden Fear				
7 Brides for 7 Brothers	4/1-15/58	15	7,022.93	1,885.17
Day of the Bad Man	4/21-28/58	8	1,285.70	271.42
Let's Be Happy				200.00
Lafayette Escadrille	5/6-12/58	7	1,667.45	666.98
Female Animal	5/13-19/58	7	1,632.55	390.64
Tammy and The Bachelor				70.00
Peyton Place	6/5-11/58	7	2,127.70	851.08
Adam and Eve	6/12-23/58	12	6,409.80	1,689.33
Stage Struck	6/24-30/58	7	3,548.25	1,238.39
Another Time, Another Place	7/1-7/58	7	3,480.31	1,218.10

TABLE NO. 2 (Cont'd)

Picture	Play Date	No. Days Played	Gross	Rental
Return of Dracula Flame Barrier	7/8-14/58	7	$ 3,266.55	$ 816.64
Across the Bridge Triple Deception	7/15-21/58	7	2,122.35	530.59
The Goddess The Line-Up	7/22-8/4/58	14	6,657.15	1,838.17
The Snorkel	8/30-9/8/58	10	4,043.10	1,544.21
Streetcar Named Desire	9/30-10/13/58	14	6,355.95	2,200.00
White Wilderness	10/14-12/8/58	56	39,953.90	14,266.07
Party Crasher As Young as You Are	12/9-15/58	7	1,232.10	369.63
Gun-Runners Cop-Haters	1/15-21/59	7	1,982.65	594.79
China Doll Fear-Makers	1/29-2/4/59	7	1,617.00	485.10
Silent Enemy	2/5-18/59	14	5,785.85	1,617.90
Mobster Intent to Kill	3/24-30/59	7	1,772.70	531.81
The Land of the Pharoahs Helen of Troy	4/28-5/4/59	7	2,554.45	766.33
Stalag 17 Place in the Sun	5/5-18/59	14	5,721.15	1,611.40
**Around the World in 80 Days	5/19-6/29/59	42	25,728.75	12,046.70
Old Man of the Sea	6/30-7/28/59	29	17,799.05	6,841.36
World, Flesh & The Devil First Man in Space	8/12-18/59	7	2,913.55	984.74 100.00
Compulsion	8/19-9/14/59	27	16,651.00	6,070.82
Totals		858	$375,194.84	$122,766.64

* In the printed record (R. 153) the printer omitted the run for this picture. It is, however, shown as a first run in plaintiff's answers to the interrogatories.

** By plaintiff's amended answers, (R. 219) the run on this picture was corrected from "1st break" to "1st regular run".

TABLE NO. 3

DELMAN THEATRE

COMPARISON OF PLAYING TIME DEVOTED TO FIRST AND SUBSEQUENT RUN EXHIBITIONS

COMPUTED ON CALENDAR DAYS

During Kirby Theatre Operation
(11/17/55 to 4/16/56)

All Pictures		First Runs		Subsequent Runs	
Days	%	Days	%	Days	%
152	100%	38	25.0%	114	75.0%

After Kirby Theatre Closed
(4/17/56 to 9/14/59)

1246	100%	858	68.9%	388	31.1%

Source: Tables 1 and 2; R. 145-158)

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IN THE

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No. 770

I. B. ADELMAN,

Petitioner,

vs.

PARAMOUNT PICTURES, INC., ET AL.,

Respondents.

REPLY BRIEF FOR PETITIONER

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THE LAKESIDE PRESS, R. R. DONNELLEY & SONS COMPANY, CHICAGO

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Respondents.

REPLY BRIEF FOR PETITIONER

The various contentions in respondents' briefs are based on fact premises which are without support in this record. They are: (1) There was no finding of antitrust violation with respect to Loew's State, Metropolitan and Majestic and petitioner therefore is not entitled to relief which permits him to compete against these three theatres; (2) the prior hearing on respondent-distributors' motion to modify the decree adjudicated petitioner's "counter-proposal" and such adjudication bars pleading the closing of the Kirby Theatre as a changed circumstance; and (3) the petitioner's first run business is better since the closing of the Kirby and therefore need for modification has not been shown.

These points will be discussed under separate headings in the order stated:

I.

It is respondents' basic contention that the first run conspiracy and monopoly found by the jury's verdict and Judge Cecil did not encompass exhibitor-respondents' three principal first run theatres, namely, Loew's State and Interstate's Metropolitan and Majestic and that therefore there is no basis for injunctive relief with respect to these theatres either now or at the time the original decree was framed (Dist. Br., pp. 5-14; Ex. Br., pp. 2-5).

Respondents' contention as to the nature of the conspiracy found in this case is expressly contradicted by Judge Cecil's findings and the record at the trial and is completely inconsistent with the position taken by all respondents at the hearing on equitable relief before Judge Cecil in 1955 and the subsequent hearing on modification of the decree in 1956.

It is beyond peradventure on this record that respondents were found guilty, both by the jury's verdict and Judge Cecil, of a conspiracy to monopolize first run exhibition in Houston. Thus, at the trial Judge Cecil instructed the jury to return a verdict for the plaintiff if they found:

> "one or more of the distributor defendants combined and conspired with said [exhibitor] defendants . . . to monopolize the exhibition of first and second run films in the City of Houston, Texas." (Emphasis supplied) (R. 280).

On the issue so framed, the jury returned a verdict in plaintiff's favor.

Subsequently, at the hearing on equitable relief, Judge Cecil found as a matter of law:

> "The defendants have been found by the jury's verdict in this case to have violated Sections 1 and 2 of the Sherman Act *by conspiring with each other to monopolize the first-run and second-run exhibition of*

films in Houston, Texas." (Emphasis supplied) (Conclusion of Law 1, R. 66).

Judge Cecil further found that the Delman had been offered only limited opportunity to compete for first run films with Interstate's Metropolitan, Majestic, Kirby and River Oaks Theatres, and that such restricted competition "has prevented the plaintiff from offering substantial competition to Interstate in either the first-run or second-run exhibition business in Houston *and is a result of the conspiracy to monopolize said first-run and second-run exhibition business found by the jury in this case.*" (Emphasis supplied) (Findings 13 and 18, R. 63-4; 64-5).

The court similarly found that petitioner's Delman had been given "no opportunity to compete with Loew's State theatre for first-run films." (Finding 13, R. 63).

The above Findings on their face clearly include all first run theatres of exhibitors. If, as respondents contend, the first run conspiracy did not apply to the big three theatres why did Judge Cecil refer to them in his Findings?

Respondents' contention rests solely on the premise that petitioner's concession at the trial that the Delman was not able to compete with the big three downtown theatres during the damage period involved (1946-1948) in effect withdrew the issue of a first run conspiracy with respect to these three theatres. Yet, nowhere do respondents demonstrate why this should follow. Whether the Delman could or could not compete with the big three theatres neither proved nor disproved the existence of the first-run conspiracy alleged. This factor was only relevant and material on the question of damages. By his concession, petitioner abandoned any claim to damages based on a comparison of admissions with these theatres, acknowledging that his Delman did not compete in terms of crossing potential.

Petitioner's counsel stated substantially the same thing to Judge Cecil at the hearing on equitable relief, as shown by the following colloquy (R. 286-7):

> "The Court: Was it said upon the trial of this case that the Delman doesn't compete for first run against Loew's State and the Metropolitan?
>
> "Mr. Wright: That is true. That was as of that period. *That concession was certainly made insofar as the award of any damages on a comparison with those theatres was based.* But I don't think, your Honor, that that concession, for the purpose of the jury submission, prevents us from now contending that as of now [plaintiff is entitled to a decree that] * * * tells the distributor defendants that they must give us an equal opportunity to compete for such exclusive runs as they offer. *We don't say they have to license us any picture. We do insist on an equal opportunity to compete with Interstate and with the operator of Loew's State for whatever exclusive runs that are offered.*" (Emphasis supplied.)

Neither Judge Cecil nor opposing counsel took exception to this statement as to the limit of petitioner's concession (R. 286-96).

At no time during that proceeding did respondents' counsel argue to Judge Cecil that there could be no injunctive relief with respect to the big three theatres because they were not within the conspiracy found by the jury. On the contrary, respondents took the position that the jury verdict was only advisory and not binding upon the court and that, in any event, the petitioner had to show that the conspiracy continued since the damage period and that injunctive relief was necessary to prevent future damage (R. 291-2). Respondents objected to a decree which permitted the Delman to compete with *any* of exhibitors' downtown first run theatres, including the Kirby (R. 290-3).

At the 1956 hearing on their motion to permit non exclusive first runs, respondent-distributors opposed petitioner's "counter-proposal" (that he be afforded an opportunity to compete against the big three theatres for films offered on an exclusive first run) on the grounds that (1) there was no formal motion by petitioner before the court and (2) petitioner had failed to demonstrate factually that such relief was warranted. Respondents did not assert that the absence of a conspiracy finding with respect to the big three theatres precluded such relief as a matter of law.

Thus, at no time during the course of the various hearings before Judge Cecil did respondents assert the contention on which they now rely. That point was apparently conceived only after the death of Judge Cecil and the transfer of the case to Judge Ingraham.

II.

Respondents next argue that petitioner is barred from pleading the closing of the Kirby Theatre as a changed circumstance and as a ground for modification of the decree because he had a reasonable opportunity to present such fact at the time of the hearing on respondent-distributors' motion to modify the decree to permit non-exclusive first run exhibitions (Dist. Br., pp. 15-20; Ex. Br., pp. 8-10). The underlying assumption is that there was an adjudication of petitioner's "counter-proposal" (that paragraph 3 A also be modified to permit the Delman to compete against respondent-exhibitors' three downtown theatres for first run films) at the prior hearing. Unless there was an express determination that petitioner was not entitled to the relief requested, there can be no estoppel even under respondents' theory (see quote from *Restatement of Judgments, Sec. 1*, Dist. Br., p. 17; Ex. Br., p. 9).

Respondents admit that at the prior hearing petitioner filed no formal motion with the court and that respondents opposed consideration of petitioner's "counter-proposal." Distributors argued that the "sole question at issue" was their motion to permit non-exclusive first runs and that petitioner's proposal was not properly before the court.

In a separate memorandum, Interstate said (R. 91-2):

> "* * * This defendant vigorously objects to the suggestion made by plaintiff * * *. There was no motion by plaintiff for such relief—no application or pleadings of any such nature have been filed by plaintiff. * * * *.*
>
> "Of course, the plaintiff upon motion and suitable proof can urge upon the court a proper modification of the decree, and of course the court upon its own motion and upon notice to the parties may make a proper modification of the decree, *but neither such course has been followed* * * *." (Emphasis supplied).

It is further admitted on this record that the order entered by Judge Cecil made no mention of petitioner's counter-proposal or any adjudication with respect thereto (R. 94-95). *The order was prepared by respondents' counsel* and, in a letter to all counsel announcing his decision, Judge Cecil said in part:

> "I have decided to grant the Motions of distributor-defendants Requesting the Modification of Paragraph 3-A of the Decree and an Interpretation of Paragraph 3-B, and I have this day signed form of Order presented to me last December by counsel for the movants."

Certainly, respondents' counsel would have included in their draft order the adverse ruling on petitioner's counter-proposal if such adjudication had, in fact, occurred. Under the circumstances, there is no basis for the assumption

that the court considered and *determined* such proposal where nothing affirmatively appears of record that this was the case.

III.

Respondents finally argue that petitioner, in any event, has failed to demonstrate factually any basis for the requested modification; that, in fact, petitioner is better off since the closing of the Kirby Theatre than before (Dist. Br. p. 19; Ex. Br. pp. 8-9).

This argument assumes that the merits of the petition for modification were before the trial Court. Yet Judge Ingraham expressly ruled that since he was dismissing the petition on the basis of the defenses of *res judicata* and estoppel, it was not necessary to reach the merits of the petition (R. 233-4). He denied petitioner's request for a hearing to present testimony and other evidence in support of the allegations of the petition on the ground that the question of a hearing was moot in view of his ruling on the legal issues (R. 233-4). The court below affirmed this decision.

Under these circumstances, the allegations of the petition with regard to the "before and after" effects of the closing of the Kirby Theatre must be taken as true. The petition alleges, *inter alia* (Par. 5, R. 98):

> "* * * that since the entry of the aforesaid decree the Kirby Theatre operated by Interstate Circuit has ceased operating as a first run theatre and that heretofore, under the decree of this Court plaintiff was afforded an opportunity to compete for first run motion pictures with said Kirby Theatre which were made available to that theatre under the Houston releasing system as a first-run theatre, but *now the Loew's State, Metropolitan and Majestic Theatres, utilize the first run pictures that were heretofore available to said Kirby Theatre*, so that now plaintiff is afforded no

opportunity at all to bid against or compete with any downtown first run theatre for an exclusive first run showing of such motion pictures in the City of Houston as are suitable for first run showing * * *" (Emphasis supplied).

This allegation is completely supported by petitioner's interrogatory answers which show available first run product was reduced by one-third after the Kirby closed.*

Conclusion.

For the reasons stated here and in our original petition, we most respectfully submit that a writ of certiorari should issue.

Respectfully submitted,

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*Although respondents in a footnote (Dist. Br. p. 19) and appendix purport to analyze petitioner's "first run" business before and after the closing of the Kirby, they omit from this analysis the most significant fact, *i.e., the availability of first run product to petitioner's Delman*. This was the question put to petitioner in Interrogatories 3 and 4, to which respondents significantly make no reference.

The interrogatory answers show that in the seven-month period (9/15/55-4/15/56) prior to the closing of the Kirby Theatre, petitioner received an invitation to bid or negotiate for 97 first run pictures, including 15 reissues (R. 159-68); that during the forty-one-month period (4/16/56-9/15/59) subsequent to the closing of the Kirby Theatre, petitioner received an invitation to bid or negotiate for 380 first run films, including 40 reissues (R. 168-93). Thus, in the first period, petitioner had available to him an average of 13.85 first run films per month. In the second period, petitioner had available to him 9.268 first run films per month. This represents a reduction of 33.08% per month in the number of first run pictures available to petitioner in the period subsequent to the closing of the Kirby Theatre.